HSU YIK CHAI

v.

HSU YAW TANG & ANOR.

FEDERAL COURT, KUCHING
SUFFIAN LP
LEE HUN HOE CJ (BORNEO)
SALLEH ABAS FJ
[CIVIL APPEAL NO. 21 OF 1982]
16 JUNE 1982

SUCCESSION: *Will - Contents in Chinese - Construction - Intention of testator expressed in words - Existence of two English translations - Which to be accepted - Whether intention to create trust for the benefit of children and widow or gift absolute or conditional.*

The appeal was concerned with the construction of a will. The validity of the will itself was not in dispute.

On 20 March 1953 one Hsu Yaw Hee (deceased) made a will in Chinese appointing his wife and his two elder brothers, the respondents as executors. His main assets were a piece of land at Matang estimated at RM11,000 and insurance money of RM5,000. His debts were stated to be RM7,522.51. He died four days later leaving a widow, a son, the appellant and three daughters. The children including the appellant, were looked after and educated by the respondents as the widow who stayed with the 1st respondent for a short period left and lived with a man. The appellant and one of his sisters were later legally adopted by the 2nd respondent on 28 March 1966. When the appellant was 16 years of age, he went to live with the 1st respondent until he was 26 years of age. He then left to live with his own mother.

Probate of the will was granted to the 1st respondent on 27 March 1953. The land was transmitted to the 1st respondent on 10 February 1965 transtents and then transferred to the respondent as owners. Eventually, the land was partitioned into three parcels and on 7 February 1980, 2 lots were transferred to the 1st respondent and 1 lot to the 2nd respondent.

In 1957 the widow sued the 1st respondent for the sum of RM5,000 being the insurance money which she claimed to be entitled to under the term of the will. The claim was eventually settled.

The will had two English translations. The first was accepted by the Probate Officer who acted on it by stamping it with the official seal. The second translation was by Datuk Amar Stephen Yong an advocate of the firm which had acted for the widow in reference to the insurance money.

The appellant contended that by the will the testator intended to create a trust for the benefit of his children and his widow and not a gift absolute or even a conditional gift. The respondents on the other hand submitted that the testator had bequeathed the land to the respondents and the widow on condition that they maintain and educate his children until they attained majority and since they had fulfilled the conditions and more, they were entitled to the land.

Held:

[1] The learned Judge was right in accepting the first translation of the will as it was an official translation accepted by the Probate Officer and endorsed with the Official Seal and this was not challenged in the civil suit mentioned earlier but was in fact relied on by the same firm which was acting for the appellant.

[2] The second translation was made by an advocate of the same firm and he could not be said to be a disinterested party. It would create a dangerous precedent if an advocate, however qualified he may be in the Chinese language, was allowed to introduce his own translation of a document in a case in which his firm was acting for one of the parties.

[3] The testator had intended to create a conditional gift in favour of the respondents and his widow. He devised the land to the respondents and his widow to enable them to use the income from the land for the support of his children until they attained majority.

[4] The learned Judge had gone very carefully into the evidence and came to the conclusion that the deceased had intended to create a conditional gift and that the two respondents had fulfilled the condition but not the widow and so the respondents were entitled to keep the land.

[5] The widow had proved to be irresponsible by leaving her children with the respondents to live with a man. Although she was young at the time and entitled to live her own life but, she was a widow with four children. She had forfeited her right having discarded the responsibility of bringing up her own children.

[Appeal dismissed with costs.]

Cases referred to:
Chan Bee Nee & Ors v. Ee Siok Choo [1947] SCR 1
Tay Sok Ann v. Tay Sok Hiong & Anor [1955] SCR 17
Phiong Khon v. Chonh Chai Fah [1970] 2 MLJ 114
*Tan Kui Lim & Anor v. Lai Sin Fah [1980] 1 MLJ **222***
Perrin v. Morgan [1943] AC 399

Other sources referred to:
Halsbury's Laws of England, 3rd Edn., Vol. 39, p. 959 para. 1457

For the appellant - W.T. Voon; M/s. Yong & Co.
For the respondents - S. Sahathevan; M/s. Battemberg & Talma

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This appeal is concerned with the construction of a will.

On 20 March 1953, Hsu Yaw Hee (deceased) made a will in Chinese. It was prepared by the secretary of the Teochew Association on the deceased's instructions and attested by two witnesses. Four days after executing the will deceased died. His main assets were a piece of land at Matang of some 9.60 acres estimated at RM11,000 and insurance money of RM5,000. His debts were stated to be RM7,522.51. Under the will deceased appointed his wife (Sung Swee Im) and his two elder brothers, the two respondents (Hsu Yaw Tang and Hsu Kwang Thai) as executors. Deceased had one son and three daughters. His son, the appellant, Hsu Yik Chai was born on 24 March 1953, the very day deceased died. His three daughters are Hsu I Ling (born on 19 April 1947), Hsu Ee Ming (born on 24 April 1949) and Hsu Ee Hung (born in 1952). After the deceased's death his widow was too poor to look after her children, so they were brought up by the two respondents. After staying for a short period with the 1st respondent the widow left and lived with a man. The Hsu family resented her behaviour and irresponsibility and subsequently severed all connections with her.

When the appellant was 12 years old and Hsu Ee Ming 16 years of age they were legally adopted by the 2nd respondent and his wife Annie Wu on 28 March 1966 in accordance with the provisions of the Adoption Ordinance (Cap. 91). Hsu Ee Ming is now married. The

appellant lived with the 2nd respondent until he was 16 years of age when he went to live with the 1st respondent until he was 26 years of age. He then left to live with his own mother. Hsu I Ling is also married. Hsu Ee Hung was adopted by the respondents' cousin. She married Lee Thian Hung and they now live in the United States of America.

Deceased was a Teochew. From time to time he sought financial assistance from the two respondents to develop his land at Matang. He was sick. He must have a premonition that he would soon die, so he decided to make a will. At the time he also signed two documents acknowledging his debts to the respondents - RM1,500 to the 1st respondent and RM5,000 to the 2nd respondent.

Probate of the will was granted to the 1st respondent on 27 March 1953. The land at Matang was transmitted to the 1st respondent on 10 February 1965 vide instrument No. L788/65. On the same day by another instrument No. L789/65 the said land was transferred to the two respondents as owners. The said land was eventually partitioned into three parcels described as Lot 228, Lot 229 and Lot 230. On 7 February 1980 by an instrument No. L1348/80 Lot 228 and Lot 229 were transferred to the 1st respondent and lot 230 to the 2nd respondent. On 13 June 1980 the appellant lodged a caveat against the said three lots of land.

In 1957 the widow sued the 1st respondent in her capacity as executor of the deceased's estate for the sum of RM5,000 being money from the insurance policy which she claimed to be entitled to under the term of the deceased's will. (Kuching High Court Civil Case No. C/50/57). The matter was eventually settled.

We now come to the will itself. The validly of the will was not in dispute. There are two English translations. The first one was accepted by the Probate Officer who acted on it (see p. 78 of the Appeal Record) by stamping it with the official seal. The second translation was by Datuk Amar Stephen Yong (see p. 85 of the Appeal Record). The two translations are set out below. The first one reads:

> I, Hsu Yaw Hee, testator of this Will, being ill for a long time, physically weak and feeble, **wish that**, in case of any unfortunate mishap occurs, myself-bought estate (O.T. No. 15677) situated at Matang Road, Kuching **be given** to my 2nd brother Hsu Yaw Tang, 5th brother Quentin Hsu Kwang Tai and my wife Sung Swee Im, **to take rightful possession** so as to assist them towards the expenses of bringing up and educating my children **until they become matured**.
>
> In the course of settling the said property, should there be any dissension, any measure agreed upon by two of the three persons concerned, will be final and can be put into effect.
>
> Regarding my insured amount, RM5,000 with the American International Assurance Company Ltd, I wish it be given to the possession of my wife, Sung Swee Im.

The second translation by Datuk Amar Yong reads:

> This Will is made by me, Hsu Yaw Hee. Owing to my long illness, my body is very weak. In the event of any unfortunate happening, I desire to give my garden situate at Matang Road (Land Lease No. 15677) including building and the crops to my second natural elder brother Hsu Yaw Tang, my fifth natural elder brother Hsu Kwang Tai and my wife Sung Swee Im, these three persons to take over and manage in order to assist my children for their maintenance and education until they are of age. In the course of managing the abovementioned property, if there should be differences of opinion, agreement of two out of the three shall resolve the issue and proceed therewith.
>
> With regard to my life insurance with the American Insurance company in the sum of RM5,000 I will that it be given to my wife Sung Swee Im.

> The learned Judge has first to decide which of the two translations should be accepted and then to construe the will. To do so he has to ascertain the language of the will, read the words used and probe the intention of the testator from them. In ascertaining the intention he is concerned mainly with four distinct matters, *viz* (1) the words used by the testator to express his intention; (2) the meaning of these words in relation to the persons and things described; (3) the meaning of the words in relation to the disposition of property among the donees and (4) the effect of any relevant Chinese custom in Sarawak. In respect of the law of inheritance the Chinese customary law of succession on intestacy has long been recognised by the Courts in Sarawak. See *Chan Bee Neo & Ors. v. Ee Siok Choo* [1947] SCR 1 and *Tay Sok Ann v. Tay Sok Hiong & Anor*. [1955] SCR 17 referred to by this Court in *Phiong Khon v. Chonh Chai Fah* [1970] 2 MLJ 114 and *Tan Kui Lim & Anor v. Lai Sin Fah* [1980] 1 MLJ 222. An administrator of a person dying intestate may distribute the estate according to recognised law or custom whereas an executor of a will must distribute the estate according to the terms of the will. We cannot see how the learned Judge could make a declaration in favour of the appellant in respect of the land in the light of the will such a declaration could only be made if there was intestacy when the estate would be distributed in accordance with the Chinese custom in Sarawak.

The learned Judge gave two reasons for accepting the first translation. One is that it was an official translation accepted by the Probate Officer endorsed with the official seal with the words "Translation of attached Chinese Will of Hsu Yaw Hee." The other is that Datuk Amar Stephen Yong's firm Yong & Co. acted for the widow in the civil suit mentioned earlier (Kuching High Court Civil Case No. C/50/57). In that case use was made of the first translation. Datuk Amar Stephen Yong whose firm acted for the widow cannot be said to be a disinterested party. It is not at all surprising that the learned Judge preferred the first translation. It would create a dangerous precedent if an advocate, however qualified he may be in the Chinese language, is allowed to introduce his own translation of a document in a case in which his firm is acting for one of the parties. Furthermore, as the learned Judge rightly pointed out, the first translation had not been challenged in a civil case mentioned earlier but was in fact relied on by the same firm which is now acting for the appellant. *Halsbury's Laws of England*, 3rd Edn., Vol. 39, p. 959, para. 1457 under the heading of Conclusiveness of Probate states as follows:-

> For the purpose of discovering what words the testator used, and what dispositions he made, the Court of Construction accepts the probate, in the case of all English wills, as conclusively showing the state in which the will was at its execution, and containing the whole will to be construed.

The contention of the appellant is that by the will the testator intended to create a trust for the benefit of his children and his widow. The two respondents and the widow were named as trustees. According to the appellant the use of the words (underlined) in the first translation such as "wish that ... be given ... to take rightful possession ... until they become matured" indicate the testator's intention was to create a trust and not a gift absolute or even a conditional gift. The appellant suggested that the testator imposed upon the two respondents and the widow each with a personal obligation to look after and maintain his children till they attained majority as they were too young to fend for themselves. On the other hand, the respondents submitted the testator bequeathed the land to the respondents and the widow on condition that they maintained and educated his children until they attained majority. It is the contention of the respondents that they had fulfilled the conditions and more, and they were entitled to the land.

The purpose of construction is to give effect to the intention of the testator expressed in the words of the will. On that point we would only refer to what Lord Romer said in *Perrin v. Morgan* [1943] AC 399 at p. 420 and also quoted by the learned Judge as follows:

> My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the Court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the Court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said ...

There can be little doubt that when the testator made the will he had in his mind the welfare of his children and widow and that he had little assets and that he had to continue to rely on his brothers to keep his family together. On the construction of the will the direction to the respondents and the widow in bringing up and educating the children until they attained majority is clearly a condition of the bequest regardless of the sufficiency of the property to generate funds for the whole period. According to 2nd respondent the income of the sale of pepper for the first year was about RM2,000. But by 1954 the pepper vines had been destroyed by disease and there was no income from the land from that year onwards. The respondents had accepted the bequest and the condition imposed by the will which far exceeded the worth of the subject of the gift, that is, the land. They had to make financial sacrifice to look after the testator's children until they came of age. The testator has prescribed a period within which the condition must be performed. This has strictly been observed by the respondents. They had done all within their power to satisfy the wishes of the testator in bringing up the children and providing them with good education until they were over the age of majority.

The testator devised the land to the respondents and his widow to enable them to use the income from the land for the support of his children until they attained majority. If the income is not forthcoming the respondents and the widow or two of them would have to decide what to do with the land to obtain the necessary fund to support the children and the widow. They could sell the land and use the money for supporting and maintaining the children (which may not be enough for the whole period) or they could keep it by assuming responsibility for supporting and maintaining the children. The respondents chose the last alternative. The widow has proved to be irresponsible by leaving her children with the respondents after more than a year after the testator's death to live with a man. She was young at the time and entitled to live her own life. But, she was a widow with four children. She had forfeited her right having discarded the responsibility of bringing up her own children. It could be that the testator understood the widow and foresaw the possibility of her marrying again and leaving the children by providing that should there be any disagreement among them the decision of two would be sufficient.

The learned Judge had gone very carefully into the evidence. He posed the question whether the deceased had intended to create a trust or a conditional gift in favour of his two brothers and his widow. He came to the conclusion that the deceased intended to create a conditional gift and that the two respondents had fulfilled the condition but not the widow so the two respondents were entitled to keep the land. He referred to the evidence of the widow during cross-examination when she had the grace to say:

> I concede that both the defendants were responsible for bringing up the four children following the death of my late husband..I did not have any plan to bring any of the children to stay with me when I went to live with the man as I could not afford it.

The two respondents had borne the responsibilities of bringing up not only their own children but also their late younger brother's children. They had given them a home, supported them and provided them with a good education. With the property the testator entrusted to them the respondents would probably be able to maintain his children and his widow for a short period but certainly not for the period it took for appellant to reach majority without having to make certain financial sacrifice. Yet, the appellant, instead of showing gratitude, chose to sue the respondents who are his uncles. In the last few years the price of land had shot up considerably and he felt that he was entitled to his natural father's property without considering how the respondents could support and maintain him and his sisters until they came of age. He was too young then. He is now old enough but not wise enough to understand human relationship and brotherly sacrifice on the part of his uncles when his mother left him and his sisters to fend for themselves. His sisters were wiser.

For the above reasons, we would dismiss the appeal with costs. Deposit to the respondents to account of taxed costs.

Also found at [1983] 1 CLJ 19